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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JAN 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
TELEPHONE COMPANY CABLE TELEVISION)
Cross-Ownership Rules,)
Sections 63.54-63.58)

CC Docket No. 87-266

RM-8221

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REPLY COMMENTS OF ESPN, INC. ON
THIRD FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

In these Reply Comments ESPN, Inc. ("ESPN") responds to the comments filed by the parties on the "capacity issues" raised by the Commission in its Third Further Notice of Proposed Rulemaking. Recognizing that legislative, judicial and regulatory actions are even now changing the role of telephone companies in the video services marketplace, ESPN, Inc. submits that the Commission, nevertheless, must adopt measures in this proceeding that protect the rights of program suppliers.

ESPN believes that it is premature for the Commission to mandate or sanction channel sharing in the name of "efficiency." If the Commission does permit channel sharing, it should impose certain conditions to protect and preserve the legal and contractual rights of programmers. Furthermore, the Commission should preclude telephone companies from managing or controlling any channel sharing arrangements, or from directing or influencing the activities of the programmer-customers on the video dialtone system.

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¹Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 (released November 7, 1994) ("Video Dialtone Reconsideration" or "Third Further Notice").

²Unlike some others who commented on the capacity issues, ESPN takes no position on the preferential access issues or on any issue related to the carriage of television broadcast stations on video dialtone systems.

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¹Telephone Company-Cable Television Cross-Ownership Rules, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 (released November 7, 1994) ("Video Dialtone Reconsideration" or "Third Further Notice").

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the rights of program suppliers. If the Commission authorizes even voluntary channel sharing, it should (1) explicitly protect the rights of program suppliers and (2) prohibit the telephone company operators of the VDT system from managing or controlling the programmer-customers or the channel sharing and other channel selection arrangements.

I. INTRODUCTION

ESPN distributes two 24-hour video services offering sports events and related news, information and lifestyle programming. Its programming on the flagship service, ESPN, is now available to more than 62 million subscribers on thousands of multichannel video program distribution ("MVPD") systems throughout the United States. In recent television ratings, ESPN was the highest rated non-broadcast programmer during prime time, and the fourth highest rated for the total day.³ The ESPN2 service recently celebrated its first anniversary and is now available to more than 16 million households. The Commission's disposition of the issues in this proceeding will have a significant impact on the future growth and dissemination of ESPN's programming.

ESPN's business objective is simply to ensure that its programming services reach every possible viewer. Historically, ESPN has relied heavily on distribution by the nation's 11,000 franchised cable systems, TVRO packagers, MMDS distributors and SMATV operators. These industries have from the beginning offered ESPN non-discriminatory access to their subscribers.

³Multichannel News, January 24, 1995, at 24.

While ESPN and its distributors have, of course, vigorously negotiated the terms of their contracts, ESPN has been able to address directly all matters related to its carriage, including channel and tier locations, and has achieved significant viewership based on the quality of its programming and its response to the demands of viewers in the marketplace. ESPN and the other program suppliers must continue to have open and nondiscriminatory access to new distribution media such as VDT. Unless we do, the potential of VDT competition in video distribution may be illusory indeed. It is because of these concerns, in the context of VDT utilization, that ESPN supports the comments of HBO and Viacom, which articulate the steps necessary to preserve the vitality of the programming industry under the Commission's VDT policies.

II. THE COMMISSION MUST RESOLVE THE "CAPACITY ISSUES" IN A WAY THAT PROTECTS THE RIGHTS OF PROGRAMMERS.

The Commission tentatively concluded in the Third Further Notice that "channel sharing mechanisms, if properly structured, can offer significant benefits to consumers, programmer-customers, and video dialtone providers, while remaining consistent with the requirements of the cross-ownership provisions of the 1984 Cable Act."⁴ The Commission's statement conspicuously omits any reference to program suppliers who are

⁴Third Further Notice at ¶ 274.

not programmer-customers.⁵ The Commission appears to perceive channel sharing as a panacea for the anticipated shortage of analog capacity insofar as that sharing would promote efficient channel utilization. However meritorious the concept of channel sharing, ESPN submits that there are a host of implementation issues affecting program suppliers that militate against premature adoption of channel sharing.

Program suppliers will play a crucial role in determining the success or failure of the telephone companies' VDT systems. Programming is, after all, the sine qua non of a competitive multichannel video distribution marketplace. Accordingly, the Commission must be sensitive to the impact that its policies and rules could have on programmers and must regulate VDT in a manner that does not artificially prejudice the program suppliers' existing incentives to offer high quality and popular programming to the public. The principal means by which the Commission can assure that program suppliers continue to compete for the viewers' attention is to maintain the incentives that now exist in the MVPD marketplace.⁶

The Commission's inclination to promote channel sharing as a means to relieve a shortage of analog capacity elicited

⁵In these Reply Comments ESPN uses the term "programmer-customer" to refer to the entity that packages programming services and provides them directly to the subscriber over VDT facilities. ESPN refers to itself and others who produce and distribute programming to the programmer-customers as "program suppliers" or simply "programmers." The telephone company that owns the physical facilities is the "VDT system operator."

⁶HBO Comments at 9-10; Viacom Comments at 8-10.

favorable, albeit conditional, responses from most of the forty parties filing initial comments. Significantly, virtually no one advocated mandatory channel sharing while many commenters supported optional sharing. The supportive commenters disagreed sharply over whether the telephone company should have any involvement in the establishment and organization of a channel sharing scheme.⁷ In any case, ESPN agrees with those parties who argue that if channel sharing proves necessary, it should be permissive, not mandatory, that it should not interfere with the rights and privileges of program suppliers, and that the telephone company should have absolutely no involvement in any aspect of the establishment and organization of the channel sharing mechanism.

In ESPN's view, the Commission should gather more evidence that channel sharing is even necessary before it endorses an arrangement that, by the Commission's own reckoning, "can raise significant legal and policy issues."⁸ For one thing, VDT system operators may try to use channel sharing as an excuse to avoid expanding analog capacity, as the Commission requires.⁹ For

⁷For example, GTE, Southwestern Bell Corporation, BellSouth and NYNEX believe that the telephone company should be involved while NCTA, US West and Adelphia, et al., believe that it should not.

⁸Third Further Notice at ¶ 275.

⁹See Video Dialtone Reconsideration at ¶¶ 30-39 (burden on local exchange carriers to demonstrate that expansion of capacity is not technically feasible or economically reasonable). See also Telephone Company-Cable Television Cross-Ownership Rules, Second Report and Order, Recommendation to Congress, and Second (continued...)

another, there have been no market trials or any other experience to demonstrate how channel sharing would work in practice. No one knows, for instance, whether channel sharing will create channel position problems for program suppliers, an issue that concerns ESPN.

It is important for ESPN that the channel carrying its programming be contiguous with other frequently viewed channels, preferably among the lower-numbered channel. With several packagers carrying (a) the shared channels, (b) a group of unshared channels (whether selected by the subscriber or the packager), (c) various local broadcast and governmental channels and (d) interactive channels, it is quite possible that the channels carrying ESPN's programming would be isolated and not contiguous with those of other programmers.¹⁰ From a subscriber's perspective, and therefore a program supplier's perspective, an isolated channel is undesirable. It is viewed less frequently than a channel adjacent to other programming services. Furthermore, it is unclear whether current technology will differentiate between channel location on the VDT system and channel location on the subscriber's television set. Absent more

⁹(...continued)

Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5797-98 (1992), and NCTA Comments at 6.

¹⁰An "isolated" channel for purposes of this discussion is one that does not have other programming on the channel positions above and below it on the subscriber's television. Subscribers typically do not "channel surf" through isolated channels; they must consciously select them. For that reason, many cable operators use isolated channels for pay-per-view services, not for regularly-viewed programming services.

information, it appears that a home subscriber to a VDT-based program service using a shared channel will not be receiving the programming services on contiguous channels, at least when there are two or more programmer-customers on the system. Thus, ESPN believes that it is premature to order or endorse channel sharing until there are some VDT market trials to demonstrate its necessity or efficacy.¹¹

There are, in fact, several reasons why channel sharing may prove to be unnecessary. First, as Southwestern Bell Corporation ("SBC") contends, it is quite possible that only one programmer-customer will survive in the increasingly competitive MVPD marketplace.¹² Second, BroadBand Technologies, Inc. may be correct that technology will advance much more quickly than anyone anticipates, eliminating any near-term shortfall of analog channels.¹³ Third, and perhaps most significant, the cross-ownership prohibition may be removed by legislative, regulatory or judicial action before the end of 1995.¹⁴ A change in the

¹¹The Commission has only just authorized US West to conduct a channel sharing trial in its Omaha, NE, VDT system. US West, Inc., Order and Authorization, FCC 94-350 (released January 6, 1995).

¹²SBC Comments at 5-6.

¹³If BroadBand Technologies, Inc. is correct in its analysis, fully digital systems with virtually unlimited capacity will be available at reasonable cost in the very near future.

¹⁴Recently, two U.S. Courts of Appeals have found the prohibition, 47 U.S.C. § 553(b), unconstitutional; the Commission has recommended to Congress that it remove the prohibition; and the Republican leadership in the Senate has proposed to remove the prohibition as part of the "Telecommunications Competition
(continued...)

status of the prohibition would undoubtedly alter the VDT landscape.

As HBO points out, it "is difficult to accurately assess the nature and extent of [channel sharing] problems because channel sharing arrangements have not previously been utilized to distribute video programming."¹⁵ Accordingly, if the Commission sanctions channel sharing on other than a trial basis, it should, consistent with HBO's and Viacom's recommendations,¹⁶ take the following steps to protect program suppliers.

First, the consent of the supplier should be a prerequisite to inclusion of a program on a shared channel. As HBO notes, channel sharing may have implications for traditional programmer concerns such as subscriber counts, program security, and marketing and affiliation agreements.¹⁷ A program supplier is entitled to assurance from packagers who are using shared channels that the supplier's rights will be accounted for and protected. The best method of securing that assurance is to condition sharing upon prior written approval by the program

¹⁴(...continued)
and Deregulation Act of 1995." In recognition of these developments, the Commission on January 11, 1995, granted Bell Atlantic conditional authority to program its Arlington, VA, VDT system, and on January 12 adopted a Fourth Further Notice of Proposed Rulemaking in this proceeding tentatively finding that all telephone companies should be allowed to program their VDT systems.

¹⁵HBO Comments at 10.

¹⁶HBO Comments at 10-11; Viacom Comments at 9.

¹⁷HBO Comments at 9.

supplier.

Second, programmer-customers must not have unfettered discretion to restrict program suppliers' access to shared channels or to discriminate in favor of, or against, program suppliers based on the suppliers' business decisions regarding the shared channels. While the provisions of Title II of the Communications Act direct the telephone company operators of the VDT systems not to engage in unreasonable or discriminatory activity with regard to their customers, the programmer-customers on the system have no Title II obligations. ESPN would not be concerned if there were no shared channels and only one programmer-customer on a VDT system. But ESPN is very troubled about the impact of multiple programmer-customers who are not regulated under Title VI of the Communications Act sharing channels on the VDT system. For these reasons, the Commission should include in any channel sharing policy the following principles:

1. No program service may be included on a shared channel without the prior consent of the program supplier, and no program supplier who requests placement on a shared channel may be refused.
2. No program packager on a video dialtone system may discriminate in its treatment of any program supplier by virtue of that supplier's willingness or refusal to have its programming carried on a shared channel.

ESPN recognizes that these protections for the program suppliers could have implications for the telephone company's preferred

channel allocation scheme.¹⁸ However, where there are multiple programmer-customers sharing channels, the risk of discrimination against suppliers is sufficiently great that the public interest warrants imposing this additional burden on VDT system operators.

The presence of multiple programmer-customers on a single VDT system may complicate the traditional business relationship between program suppliers and cable and other MVPD operators in other ways. With respect to dealing with multiple programmer-customers, the programmer-customers could theoretically designate a single representative, who might be one of the programmer-packagers or an independent channel manager. ESPN believes that such an approach would not adequately take into account the program supplier's prerogative to choose the MVPDs with which it wants to do business, whether that business involves an exclusive distribution arrangement or any other relationship. Accordingly, ESPN joins Viacom in urging the Commission to take affirmative steps to preserve the right of program suppliers to control in every respect the distribution of their products.¹⁹

Finally, telephone companies have generally tried to resist the Commission's mandate that they add analog channel capacity to meet the needs of programmers. They argue that analog channels

¹⁸For example, in its recently approved Omaha, NE, trial, note 11 supra, US West plans to have 28 shared channels. If 29 program suppliers wished to be assigned shared channels, it would be US West's duty to add another shared channel. Adding another shared channel could require US West to reassign some of its unshared channels.

¹⁹Viacom Comments at 10.

do not use the spectrum efficiently, cannot be interactive, and represent technology that will eventually be obsolete.²⁰ The Commission's channel sharing proposal seems to be an effort to compromise with the telephone companies: if sharing is permitted, the telephone companies may have enough analog channels in their initial VDT configurations to satisfy all programming demand pending conversion to digital technology. ESPN is not so sanguine that sharing will prevent analog channel shortage.

ESPN launched ESPN2 in 1993 and has other program services in development that it anticipates will complement its established services. Once all the shared channels are assigned, which may occur relatively quickly, it is far from clear that these new program services will find homes on VDT analog channels that reach all subscribers to the programmer-customers' packages. Accordingly, ESPN urges the Commission to confirm that any endorsement of channel sharing is not a retreat from its requirement that telephone companies expand analog capacity as requested by programmers.²¹

²⁰See NCTA Comments at 9-13.

²¹ESPN supports the related concern raised by HBO in its Comments, at 4-5, that there be enough analog capacity for VDT programmer-customer to assemble packages and "tiers" that are competitive with those offered by the entrenched cable operators.

III. THE COMMISSION SHOULD PROHIBIT ANY TELEPHONE COMPANY INVOLVEMENT IN PROGRAM PACKAGING, CHANNEL SELECTION OR VDT SYSTEM ADMINISTRATION

Having failed to persuade the Commission to approve the anchor programmer concept,²² many of the telephone company commenters propose that they be allowed to administer or manage, or select the administrator or manager of, the VDT system.²³ The telephone companies argue that administrative simplicity and efficiency justify their supervision of the programmer-customers, or at least justify a role for them in developing and administering the channel sharing design. It is unsurprising that the telephone companies would try to stretch the limits of the Commission's VDT rules and regulations. ESPN submits, however, that granting the telephone companies any flexibility to formulate, manage or supervise channel sharing or any other aspect of the content carried on the VDT system would only compound the potential consequences of channel sharing, discussed above. The telephone companies would have unwarranted leverage over packagers and program suppliers, and their participation would be inconsistent with the common carrier model and legal precedent.²⁴

²²Video Dialtone Reconsideration, at ¶ 35.

²³E.g., Comments of GTE at 11-14; Comments of SBC at 7-9.

²⁴The Commission's ultimate decision on the tentative conclusions adopted in its Fourth Further Notice of Proposed Rulemaking, note 14 supra, would obviously change the role of telephone companies as debated in the comments in this phase of the Video Dialtone proceeding. In its Reply Comments ESPN is responding only to those issues raised in the Third Further Notice without prejudice to positions it might take in light of the Fourth Further Notice.

It bears repeating that video dialtone is no different from any other traditional offering of an interstate common carrier service under tariff. The Commission has often reiterated this point, most recently in the Video Dialtone Reconsideration order: "[local exchange carriers] are permitted to offer, on a nondiscriminatory basis, a basic common carrier video delivery platform that must accommodate multiple video programmers and expand as demand increases" ²⁵ A company offering a common carrier service may not, under prevailing law, influence, add to, or change the information placed on its facility by its customer. ²⁶

The court's opinion in National Cable Television Ass'n v. FCC ²⁷ affirming the Commission's Video Dialtone First Report and Order, makes abundantly clear that the Commission must maintain a bright line between the provision of video dialtone common carrier service and the operation of a cable system. The statutory scheme demands as much. ²⁸ Accordingly, until such time as telephone companies become cable operators regulated under

²⁵Video Dialtone Reconsideration, at ¶ 9. The Commission's characterization of VDT service is fully consistent with the definition of "common carriage" that it has applied to all telecommunications companies for many years. See National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1992).

²⁶See NCTA Comments at 17-18. For a general discussion of this issue, see M. Kellogg, J. Thorne & P. Huber, Federal Telecommunications Law ¶ 16.7.4 (1992)

²⁷33 F.3d 66 (D.C. Cir. 1994).

²⁸Id. at 75.

Title VI of the Communications Act, they must arrange their business activities to remain within the confines of Title II.²⁹

ESPN's and the other program suppliers' concerns are by no means ill-founded. As NCTA and the other cable operator commenters point out, the telephone companies want to be cable operators, not common carrier video dialtone providers. Many have shown that they will use the legislative, regulatory and judicial processes relentlessly to try to break down the barriers between common carriage and cable service. Whatever their future success or failure at changing the ground rules in court or the Congress, the Commission should be vigilant lest there be any de facto dismantling of the regulatory barriers. It does not require much of a leap for telephone companies to move from managing shared channels in the name of efficiency to influencing or even determining the prices to be paid to suppliers for programming, or assigning channel positions to those programmers. When they make that leap, and they will, program suppliers must be able to rely on the existence of regulatory and statutory protections that preserve their control over their programming and the stability of their bargaining position with MVPDs.

IV. CONCLUSION

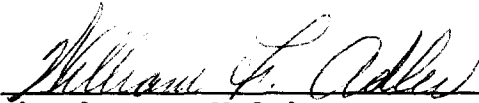
In its zeal to promote competition in the MVPD marketplace, which ESPN heartily endorses, the Commission risks neglecting the interests of those who provide the fuel that will drive the broadband infrastructure: the program suppliers. ESPN, Inc.,

²⁹But see notes 14 and 24, supra.

therefore, respectfully requests that the Commission adopt policies and rules consistent with its recommendations in these Reply Comments.

Respectfully submitted,
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